

STATE OF ARIZONA
OFFICE OF ADMINISTRATIVE HEARINGS

1
2
3 [REDACTED], a Student, by and through
4 Parents [REDACTED] & [REDACTED],

No. 07C-DP-07050-ADE

5 Petitioners,

6 -v-

7 Deer Valley Unified School District No.
8 97,

9 Respondent.
10

ADMINISTRATIVE
LAW JUDGE
DECISION

11 **HEARING:** September 19-20, 2007.

12
13 **APPEARANCES:** Petitioners, Parents [REDACTED] and [REDACTED], appeared on behalf of
14 themselves and Student [REDACTED] and were represented by non-attorney advocate Natalie
15 Schoenbauer, Ph.D.;¹ attorney Lindsay E. Jones, GUST ROSENFELD, PLC, appeared
16 on behalf of the Deer Valley Unified School District (DVUSD), accompanied by Richard
17 Gray, Ph.D., District Forensic Psychologist and Assistant Special Education Director,
18 DVUSD.

19 **WITNESSES:**² For Petitioners: [REDACTED], Mother.

20 For Respondent School District: Perri Krom, Special
21 Education Administrator, DVUSD ("Administrator"); Melissa Rose, Special Education
22 Teacher, DVUSD ("Special Education Teacher R"); Sarah Henry, Special Education
23 Teacher, DVUSD ("Special Education Teacher H"); Nora Eddy, Extended School Year
24 Coordinator, DVUSD ("ESY Coordinator"); and Richard Gray, Ph.D. ("District
25 Psychologist").

26 **ADMINISTRATIVE LAW JUDGE:** Eric A. Bryant

27
28 Parents bring this due process action, on behalf of Student, to challenge the
29 actions of Respondent School District with regard to its obligations toward Student, who
30 is a child with a disability. The law governing these proceedings is the Individuals with

¹ Ms. Schoenbauer's representation was granted by this tribunal under Arizona Supreme Court Rule 31(d)(15) by Order dated August 21, 2007.

1 Disabilities Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as
2 re-authorized and amended in 2004),³ and its implementing regulations, 34 Code of
3 Federal Regulations (C.F.R.) Part 300,⁴ as well as the Arizona Special Education
4 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and
5 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.⁵

6 Petitioners filed their due process complaint on May 15, 2007. Several
7 postponements of the hearing dates were granted upon the request of the parties and
8 several pre-hearing conferences were held on July 26, 2007, and September 4, 2007,
9 after which it was established that Petitioners are making the following claims, alleging
10 them to be violations of the IDEA and its implementing regulations:

- 11 A) The October 25, 2006, Individualized Education Program
12 (hereinafter "IEP") did not address each of Student's
13 individual needs as identified in the Multidisciplinary
14 Evaluation Team (MET) report (discrepancy between
15 the "present levels" and IEP goals; no alignment
16 between Student's needs and the goals and services
17 provided).
- 18 B) No documented data was identified to support the IEP's
19 discontinuation of the decoding goal and
20 implementation of the fluency goal.
- 21 C) Student did not show adequate academic progress on
22 fluency goals in the IEP.
- 23 D) Student was eligible for Extended School Year (ESY)
24 services for the summer of 2007 and Respondent

25 ² To avoid the use of proper names, in order to protect confidentiality, each witness is designated a
26 generally descriptive title to be used in the body of the Decision. The proper names are grouped here for
27 ease of redaction.

28 ³ By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004,"
29 IDEA 2004 became effective on July 1, 2005.

30 ⁴ The current federal regulations became effective October 13, 2006, during the time period at issue here.
This means that events that occurred before October 13, 2006, are governed by the pre-October 2006
regulations, and those occurring after October 13 (the majority of events here) by the current regulations.
However, a comparison of the former and current regulations that apply to the issues in this case shows
that the applicable regulations are substantially the same, the differences being only re-numbering and
minor grammatical changes. Therefore, because there is no material difference in the two versions, this
Decision will apply and cite only the current regulations.

⁵ It is noted that these rules are being revised to comport with the 2005 changes in federal and Arizona
special education law, but have not yet been published by the Arizona Secretary of State.

1 School District did not offer the services soon enough
2 for Student to enroll.

3 E) Student was denied education in the Least Restrictive
4 Environment (LRE) because he was educated outside
5 the general education population more than was
6 called for in the IEP.

7 F) Respondent School District failed to acquire informed
8 parental consent prior to initial provision of special
9 education and services.

10 G) Respondent School District prevented Parents from
11 being full participants in IEP meetings by withholding
12 information.

13 H) Respondent School District wrongly denied Parents'
14 request for evaluation regarding dyslexia.

15 Furthermore, it was established that Petitioners are seeking 405 hours of compensatory
16 education consisting of one-on-one tutoring in reading and additional compensatory
17 education for Respondent School District's failure to provide ESY for 2007.

18 The parties presented testimony and Exhibits at the hearing on September 19
19 and 20, 2007. Petitioners presented testimony from Mother and offered into evidence
20 Exhibits A, B, C, D, E, F, G, H, I, J, K, L, N, O, P, Q, R (for limited purpose), T, and V,
21 all of which were admitted into the record.⁶ Respondent School District presented
22 testimony from the witnesses noted above and offered Exhibits numbered 1 through 20,
23 which were also admitted.⁷

24 After the hearing, the parties submitted written closing arguments—Respondent
25 School District on September 28, 2007, and Petitioners on October 5, 2007. The
26 Administrative Law Judge has considered the entire record, including the testimony and
27 exhibits,⁸ and now makes the following Findings of Fact, Decision, and Order finding
28 that while there were procedural violations by Respondent School District, the violations

29 ⁶ These Exhibits are listed and briefly described in PETITIONER LIST OF WITNESSES/EXHIBITS filed
30 September 11, 2007.

⁷ RESPONDENT'S LIST OF WITNESSES AND EXHIBITS was filed September 11, 2007.

⁸ The Administrative Law Judge has read each admitted Exhibit, even if not mentioned in this Decision.
The Administrative Law Judge has also considered the testimony of every witness, even if not mentioned
in this Decision.

1 did not deny Student a free appropriate public education. Also, there were no
2 substantive violations of the IDEA.

3 FINDINGS OF FACT

4 1. Student is currently a third grader attending school in Respondent School
5 District. This case concerns his second grade year in 2006-2007, which he also
6 attended in Respondent School District.

7 2. Prior to August 2006, Student attended a charter school and was not
8 identified as a child with a disability. In April 2006, Student was evaluated, with these
9 results:

10 [Student] shows a specific weakness in tasks that require
11 him to name alphabet letters, identify and generate letter
12 sounds and rhyming words, and match and read a series of
13 printed words. [Student] shows a specific weakness in tasks
that required [him] to correctly apply phonetic decoding rules
when reading a series of nonsense words.⁹

14 Student was found eligible for special education under the category of Specific Learning
15 Disability (SLD) in the area of basic reading skills.¹⁰ In May 2006, an IEP was created
16 for Student. It contained one goal—"[Student] will decode words using word knowledge
17 of phonics, syllabication and word parts as measured by earning a 80% or better on
18 classroom assessments and oral readings"—and three performance objectives: (1)
19 "Read multi-syllabic words fluently, using letter-sound knowledge;" (2) "Apply knowledge
20 of basic syllabication rules when decoding 2 or 3 syllable written words;" and (3)
21 "Recognize regular plurals and irregular plurals in context."¹¹ It provided that Student
22 would receive special education in a "resource room" setting.¹² This IEP was accepted
23 by all on the IEP team, but it was not implemented because the school year ended and
24 Student changed schools.

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26
27 ⁹ Exhibit A at 10. (Note: Exhibit 1 is identical to Exhibit A.)

28 ¹⁰ *Id.* at 11.

29 ¹¹ Exhibit B at 4. It is noted that although pages in Exhibit B are designated "1 of 21" and so forth, there
30 are fewer than 21 pages in the Exhibit; many pages appear to be missing. However, the document
appears to be complete. (Note: Exhibit 4 contains the same pages as Exhibit B, and the same missing
pages out of 21.)

¹² *Id.* at 12.

1 3. In August 2006, Student enrolled in Respondent School District and began
2 attending. Parents presented Respondent School District with copies of the charter
3 school's evaluation report and May 2006 IEP that was created but never implemented.
4 Parents' copies of these documents were unsigned.¹³ A meeting was set in late August
5 for an IEP team to meet and consider services for Student; Respondent School District
6 sent away for Student's records from his prior school.

7 4. In late August 2006, an IEP team that included Parents met and reviewed the
8 evaluation and IEP from the charter school.¹⁴ The charter school's records had been
9 received and they contained signed and initialed copies of documentation.¹⁵ The IEP
10 team accepted Student's eligibility and adopted the May 2006 IEP verbatim as a
11 temporary IEP for Student to last until October so that Respondent School District could
12 work with Student and then formulate a permanent IEP to last for the remainder of the
13 year.¹⁶ The IEP team would meet again in October.

14 5. Respondent School District was aware that Student had not received services
15 from the charter school under the May 2006 IEP and that, therefore, Respondent
16 School District was the first public agency to provide services to Student. The
17 documentation received from the charter school contained various forms that were
18 signed by Mother. One form signed by Mother signified that she, and other members of
19 the evaluation team, agreed that Student was eligible for special education.¹⁷ Another
20 signified that Mother had received Prior Written Notice (PWN) and a copy of the
21 Procedural Safeguards Notice that is required to be given to all parents of eligible
22 children; Mother signed the form.¹⁸

23 6. Finally, an "Educational Placement Statement" form, intended to document,
24 among other things, parental consent to placement in special education, shows
25 signatures by two of the charter school personnel who were team members and the
26 initials "●" in three separate places on the form.¹⁹ One of the sets of initials "●"

27 ¹³ See Exhibits A and B.

28 ¹⁴ Exhibits C and 3.

29 ¹⁵ Exhibits 1 and 1a.

30 ¹⁶ Exhibits 2 and 3.

¹⁷ Exhibit 1 at 13.

¹⁸ *Id.* at 12.

¹⁹ Exhibit 1a.

1 appears in a blank space before the statement "As a result of this evaluation, with full
2 awareness of my parental rights, I **AGREE** with this placement."²⁰ At hearing, Mother
3 credibly testified that she did not write those initials; thus, she did not sign the written
4 consent for initial placement. However, there was no way for Respondent School
5 District to know this.

6 7. Student began receiving special education from Respondent School District in
7 August 2006. Respondent School District did not obtained its own written informed
8 consent from Parents before initiating the provision of services to Student in August
9 2006. Thus, it does not appear that Parents ever provided written consent to the initial
10 provision of services.

11 8. Parents were informed at the August 2006 IEP team meeting that reading
12 and writing were taught to all second grade students during a "Language Arts block."
13 This was a 90-minute block of time.²¹ Parents were informed at the August 2006 IEP
14 team meeting that Student would receive his special education instruction "during the
15 Language Arts block which also includes writing."²² From this, Parents were put on
16 notice that Student would go to the resource room for the Language Arts block and be
17 taught reading and writing by the special education teacher. This is, in fact, what
18 happened, except that Student was taught Language Arts by two special education
19 teachers, one who focused more on reading and the other who focused more on
20 writing, although reading and writing were always taught in conjunction with each other
21 by both teachers.²³ Student was taught the same Language Arts curriculum as general
22 education students, with modifications for Student's individual needs.²⁴

23 9. Mother testified that on October 11, 2006, she met with Special Education
24 Teacher R. She testified that she had a copy of a draft IEP that contained many errors
25 and typos. She and Special Education Teacher R went over the typos and discussed

26 ²⁰ *Id.* (emphasis in original).

27 ²¹ This finding is based on the testimony of various witnesses called by Respondent School District at the
28 hearing. The documentation is of no help in this regard; Exhibit 3 mentions the Language Arts block but
29 does not provide a description. The consensus of the witnesses was that the Language Arts block was a
30 90-minute period.

²² Exhibit 3.

²³ Testimony of Special Education Teacher R, 9/20/07 Hearing Record (hereinafter "9/20/07 H.R.") at
2:13; testimony of Special Education Teacher H., 9/20/07 H.R. at 3:10.

²⁴ *Id.*

1 corrections to be made to errors about Student's personal information. Mother also
2 testified that at that meeting she requested that Student be assessed for dyslexia. She
3 testified that Special Education Teacher R told her that Respondent School District
4 does not test for dyslexia and that even if Student had dyslexia it would not change how
5 he was being taught reading. Mother testified she then mentioned that she understood
6 she could get an independent evaluation and Special Education Teacher R replied
7 "yes." That ended the discussion of that topic.²⁵ Later, Mother admitted that the
8 conversation about dyslexia could have occurred not in October 2006, but at a parent-
9 teacher conference in March 2007²⁶. She was not really sure.

10 10. Special Education Teacher R testified that although she was supposed to
11 have met with Mother on October 11, 2006, she did not make it because she injured
12 herself and cancelled the meeting.²⁷ However, she testified that she did talk with
13 Mother about dyslexia on one occasion.²⁸ She remembered the conversation about
14 dyslexia as being short. She testified that it consisted of Mother asking if Respondent
15 School District screened for dyslexia and Special Education Teacher R telling her that it
16 did not. She did not think that Mother was requesting an evaluation or she would have
17 referred her to make a written request to the IEP team, as Mother did in regard to
18 occupational therapy services in Spring 2007.

19 11. There is no written parental request for additional assessment of Student for
20 dyslexia.

21 12. On October 24, 2006, the IEP team met and created a permanent IEP for
22 Student. This IEP contained two goals: (1) "[Student] will read fluently with less than 5
23 word substitutions and demonstrate phonemic awareness when decoding unknown
24 words;" and (2) "[Student] will read using punctuation so that his reading sounds like
25 normal speech."²⁹ In every other respect, the October IEP was virtually the same as
26
27

28 ²⁵ Mother's testimony, 9/19/07 H.R. at 1:14, 1:50, and 4:17.

29 ²⁶ 9/19/07 H.R. at 4:47.

30 ²⁷ 9/20/07 H.R. at 1:29.

²⁸ 9/20/07 H.R. at 2:59.

²⁹ Exhibit D.

1 the August IEP. As with the prior IEP, there is no mention of the Language Arts block
2 in the IEP.³⁰

3 13. Over the next several months, until March 2007, no major educational
4 events occurred and Student was educated under the October IEP. There is evidence
5 that Student progressed in reading skills. Student's grades in reading were good³¹ and
6 both of Student's special education teachers testified that they taught him decoding
7 skills³² and that he made good progress.³³ Mother testified that she felt he made very
8 little progress in reading, but her untrained, subjective impressions do not outweigh the
9 credible testimony of the Student's special education teachers. Plus, that testimony is
10 backed by reading assessment data that shows progress.³⁴

11 14. This tribunal finds that Student made progress in reading throughout the
12 year.

13 15. In March 2007, Parents hired an evaluator to evaluate Student for dyslexia.
14 That evaluation found "moderate to severe dyslexia" and made various
15

16
17 ³⁰ At this point it is noted that the documentation generated by Respondent School District and submitted
18 into evidence is consistently sloppy. Respondent School District's recordkeeping, based on the record
19 before this tribunal, is abysmal. The dates on many documents are unreliable because there are so many
20 erroneous dates and typographical errors. There are many unnumbered pages and missing pages; one
21 cannot tell from the face of the document if one has the entire document. And there are numerous non-
22 date typos and errors throughout the documents too. Furthermore, many sections of the documentation
23 are vague or filled with items that are not applicable to the particular student. This is confusing.

24 As just one example of this sloppiness that causes confusion, take one page of Exhibit D—the October
25 IEP. The second page of Exhibit D is the signature page for the October IEP. The page is dated
26 10/11/2006 and the signatures are dated 10/24/2006, yet many of the other pages of the document are
27 dated 10/25/2006 (the day after it was signed?!) and some 10/11/2006. This makes a very confusing
28 document. Unfortunately, this type of problem is not limited to Exhibit D, but runs throughout many of the
29 Exhibits. Typos here and there are to be expected in a large amount of documentation, but in this case it
30 is excessive. This is some of the sloppiest documentation that this tribunal has seen. It made reviewing
the record in this case difficult. And it likely led to some of Parents' misunderstanding and confusion
about their child's education. If so, their confusion is certainly understandable.

In the final analysis, however, there is no IDEA violation for "sloppy documentation." Only if a required
document or piece of information is missing will a violation be found. However, Respondent School
District should consider the costs of sloppy documentation. Parents who review this type of
documentation are more likely to file a complaint than if the documentation is clear and understandable.

³¹ Exhibit 19.

³² Testimony of Special Education Teacher R, 9/20/07 H.R. at 1:26; testimony of Special Education
Teacher H, 9/20/07 H.R. at 3:07.

³³ Testimony of Special Education Teacher R, 9/20/07 H.R. at 1:44; testimony of Special Education
Teacher H, 9/20/07 H.R. at 3:20.

³⁴ Exhibit 19.

1 recommendations, including an evaluation for occupational therapy to address
2 Student's handwriting.³⁵

3 16. In April 2007, Parents made a written request for an IEP meeting to review
4 the IEP and consider the private dyslexia evaluation.³⁶ Parent also requested an
5 occupational therapy evaluation. A meeting was held on April 26, 2007, and the issues
6 discussed. The outcome of the meeting was that Student would be evaluated for
7 occupational therapy (OT) and the team would meet again in May 2007 to address the
8 OT evaluation, the IEP, and the private dyslexia evaluation.³⁷

9 17. A major topic of discussion at the April meeting was Extended School Year
10 (ESY) services, raised by Parents. That discussion was lengthy and heated,³⁸ and
11 carried over to the May 2007 meeting.

12 18. On May 15, 2007, Parents filed their due process hearing complaint.

13 19. On May 23, 2007, the IEP team met again. They found that Student
14 continued to be eligible for special education in basic reading skills and found that he
15 needed OT to be added to his IEP.³⁹ They also offered ESY for Student and created
16 an Addendum to the October IEP (the then-current IEP) that found Student eligible for
17 ESY services for Summer 2007.⁴⁰ This was one day before the last day of school and
18 Parents stated that they would have to consider the offer of ESY before accepting it.

19 20. During April and May 2007, Respondent School District had maintained that
20 Student was not eligible for ESY. However, as noted, in late May Respondent School
21 District declared that Student was eligible for ESY and issued documentation to that
22 effect. Therefore, Respondent School District is bound by that declaration and may not
23 now argue that Student was not eligible.

24
25 ³⁵ Exhibit G. The use of this Exhibit is clouded by the fact that it appears to be the unauthorized practice
26 of psychology in Arizona. District Psychologist credibly testified that the author of the report is not an
27 Arizona-licensed psychologist and the report was not done within the scope of employment as a school
28 psychologist. 9/20/07 H.R. at 5:15 to 5:20 (in this regard, it was surprising that District Psychologist
29 apparently did not file a complaint with the Arizona Psychology Board or notify the author of the violation).
30 This makes Exhibit G carry very little weight and be of very limited value.

³⁶ Exhibit H.

³⁷ Exhibit I.

³⁸ *Id.*

³⁹ Exhibit N.

⁴⁰ *Id.*

1 21. As declared by Respondent School District in the May 2007 Addendum to
2 the IEP, Student was eligible for ESY for Summer 2007.

3 22. After considering the ESY program, Parents refused it. When asked at
4 hearing the basis for this rejection, Mother stated that Parents had signed Student up
5 for a private instruction service that provided a better student-teacher ratio than the
6 ESY program and more scheduling flexibility in regard to a planned trip for Student to a
7 church camp.

8 23. Other issues at the May 23, 2007, IEP meeting were tabled due to the due
9 process complaint filed by Parents.⁴¹

10 CONCLUSIONS OF LAW

11 1. This case presents a variety of allegations based on the IDEA. Petitioners'
12 raise issues concerning consent to special education services, requests for evaluation,
13 content of the IEP, parental participation in creating an IEP, educating Student in the
14 least restrictive environment, the provision of ESY services, and Student's academic
15 progress in his area of disability.⁴² The applicable law in these areas is as follows.

16 APPLICABLE LAW

17 2. Through the IDEA, Congress has sought to ensure that all children with
18 disabilities are offered a free appropriate public education that meets their individual
19 needs.⁴³ These needs include academic, social, health, emotional, communicative,
20 physical, and vocational needs.⁴⁴ To do this, school districts must identify and evaluate
21 all children within their geographical boundaries who may be in need of special
22 education and services. The IDEA sets forth requirements for the identification,
23 assessment and placement of students who need special education, and seeks to
24 ensure that they receive a free appropriate public education. A free appropriate public
25 education (FAPE) consists of "personalized instruction with sufficient support services
26 to permit the child to benefit educationally from that instruction."⁴⁵ The IDEA mandates

27 ⁴¹ *Id.*

28 ⁴² See the statement of issues above at page 2-3.

29 ⁴³ 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

30 ⁴⁴ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
U.S.C.C.A.N. 2088, 2106).

⁴⁵ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

1 that school districts provide a "basic floor of opportunity," nothing more.⁴⁶ It does not
2 require that each child's potential be maximized.⁴⁷

3 Eligibility and Evaluation

4 3. To provide the instruction and services required by the law, school districts
5 must inform themselves about a student's disability and needs. This is accomplished
6 by conducting "a full and individual initial evaluation" and subsequent re-evaluations to
7 determine the child's eligibility and educational needs.⁴⁸ This consists of reviewing
8 existing data and identifying any additional data that is needed.⁴⁹ When further
9 assessment or testing is needed, the school district is responsible for procuring it.⁵⁰

10 4. To be eligible for a free appropriate public education, a student must be a
11 "child with a disability."⁵¹ This means that the student has a disability falling within one
12 of ten enumerated disability categories (or multiple disabilities), including mental
13 retardation, hearing and visual impairments, serious emotional disturbance, autism, or
14 other health impairments, and because of the disability (or disabilities) needs special
15 education and related services.⁵² Specifically, an eligible student is "a child evaluated
16 in accordance with [IDEA regulations] as having [an enumerated disability], and who, by
17 reason thereof, needs special education and related services."⁵³

18 5. "Specific learning disability" is one of the enumerated disabilities. It is defined
19 as:

20 [A] disorder in one or more of the basic psychological
21 processes involved in understanding or in using language,
22 spoken or written, which disorder may manifest itself in the
23 imperfect ability to listen, think, speak, read, write, spell, or
24 do mathematical calculations.⁵⁴

25 ⁴⁶ *Id.*, 458 U.S. at 200.

26 ⁴⁷ *Id.* at 198.

27 ⁴⁸ 20 U.S.C. § 1414(a)(1) and (a)(2).

28 ⁴⁹ 20 U.S.C. § 1414(c)(1).

29 ⁵⁰ 20 U.S.C. § 1414(c)(2).

30 ⁵¹ 20 U.S.C. § 1412(a)(1)(A).

⁵² 20 U.S.C. § 1401(3).

⁵³ 34 C.F.R. § 300.8(a)(1); see A.R.S. § 15-761(2).

⁵⁴ 20 U.S.C. § 1401(30); 34 C.F.R. § 300.8(c)(10) (same definition); see also A.R.S. § 15-761(34) (incorporating by reference the definition found in the federal statute).

As examples of the types of disorders that are included in the specific learning disability category, such conditions as brain injury, perceptual disabilities, and dyslexia are listed.⁵⁵ The "basic psychological processes" referred to are identified in the IDEA regulations as oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving.⁵⁶ In addition, other criteria must be met before a specific learning disability can be found. These include a significant discrepancy between the child's achievement and ability (in other words, underachievement) in the areas just listed, and failure of the child to respond to scientific, research-based intervention.⁵⁷

6. In order to determine whether a child has a categorical disability and the nature and extent of any special education he may need, an evaluation process is mandated.⁵⁸ In conducting the evaluation, the school district must use a variety of means for gathering a variety of information about the student, including information from the parent.⁵⁹ The goal is to gather functional, developmental, and academic information about the child so that the evaluation is comprehensive as to the student's educational needs.⁶⁰ This information should come from teachers, parents, medical professionals, and other specialists who have assessed, evaluated, tested, and observed the student in a variety of settings but especially in the classroom.⁶¹

Individualized Education Program and Consent

7. Once a child is determined eligible for special education services, a team composed of the child's parents, teachers, and others formulate an Individualized Education Program (IEP) that, generally, sets forth the child's current levels of educational performance and sets annual goals that the IEP team believes will enable the child to make progress in the general education curriculum.⁶² The IEP tells how the

⁵⁵ *Id.*

⁵⁶ 34 C.F.R. § 300.309(a)(1).

⁵⁷ 34 C.F.R. § 300.309(a)(2) and (3). There are other criteria as well. However, because there is no dispute about the nature of Student's specific learning disability, the criteria need not be discussed.

⁵⁸ 20 U.S.C. § 1414(a)(1); 34 C.F.R. § 300.15; A.R.S. § 15-766.

⁵⁹ 34 C.F.R. § 300.304(b); 34 C.F.R. § 300.306(c).

⁶⁰ 34 C.F.R. § 300.304(c).

⁶¹ 34 C.F.R. § 300.305(a); 34 C.F.R. § 300.306(c)(i).

⁶² 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

1 child will be educated, especially with regard to the child's needs that result from the
2 child's disability, and what services will be provided to aid the child. The child's parents
3 have a right to participate in the formulation of an IEP. To foster full parent
4 participation, in addition to being a required member of the team making educational
5 decisions about the child, school districts are required to give parents written notice
6 when proposing any changes to the IEP,⁶³ and are required to give parents, at least
7 once a year, a copy of the parents' "procedural safeguards," informing them of their
8 rights as parents of a child with a disability.⁶⁴ School districts are also required to obtain
9 parental consent before evaluating the child and before the initial provision of special
10 education and services.⁶⁵

11 Least Restrictive Environment

12 8. Children with disabilities are entitled to be educated with non-disabled
13 children "to the maximum extent appropriate."⁶⁶ This means that children receiving
14 special education services should not be removed from the regular education setting
15 unless the child cannot be educated in that setting. Furthermore, if necessary to
16 provide FAPE and as determined by the IEP team, a child with a disability is entitled to
17 be educated beyond the normal school year.⁶⁷ This is known as ESY—extended
18 school year—services and applies primarily to the summer break between school years.

19 Extended School Year Services

20 9. Though federal law merely states that ESY services must be "available as
21 necessary to provide FAPE,"⁶⁸ Arizona has defined when such services are necessary
22 and how eligibility for ESY services is to be determined. A child with a disability is
23 eligible for ESY services if either (1) the gains made during the regular school year
24 would be "significantly jeopardized" without ESY; or (2) without ESY "severe or
25 substantial regression" would ensue and "substantial skill loss" that would "seriously
26 impede" the child's progress toward goals would result.⁶⁹ Eligibility for ESY is to be

27 ⁶³ 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503.

28 ⁶⁴ 20 U.S.C. § 1415(d); 34 C.F.R. § 300.503.

29 ⁶⁵ 20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300.

30 ⁶⁶ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2).

⁶⁷ 34 C.F.R. § 300.106.

⁶⁸ *Id.*

⁶⁹ A.R.S. § 15-881(A).

1 determined by the child's IEP team at least 45 calendar days before the last day of
2 school⁷⁰ and by reviewing retrospective data and predictive data regarding regression
3 and recoupment.⁷¹ Arizona law is clear that ESY services are voluntary and are NOT
4 for purposes of, among other things, maximizing a child's academic potential.⁷²

5 The "Harmless Error" Rule

6 10. Finally, the inquiry in a due process hearing is whether or not the child has
7 received FAPE. This can be determined substantively by looking at the IEP and its
8 implementation and determining if FAPE was provided. Or, it can be determined on the
9 basis of the procedural rights held by parent and child. Procedural violations deny
10 FAPE only if they: (1) impede the child's right to FAPE; (2) "significantly impede"
11 parental participation in the process; or (3) result in a "deprivation of educational
12 benefit."⁷³ Procedural violations that do not result in one of those three situations do
13 not deny FAPE—they are considered legally harmless.

14 DECISION

15 11. A parent who files for a due process hearing alleging non-compliance with
16 the IDEA must bear the burden of proving that claim.⁷⁴ The standard of proof is
17 "preponderance of the evidence," meaning evidence showing that a particular fact is
18 "more probable than not."⁷⁵ Therefore, Petitioners bear the burden of proving by a
19 preponderance of evidence that Respondent School District has failed to provide FAPE or
20 has violated the procedural protections of the IDEA with more than harmless error.
21 Petitioners have not met this burden. The issues will be addressed as set forth above.

22 A) *Did the October 25, 2006, IEP address each of Student's individual needs as*
23 *identified in the charter school MET report?*

24 12. Petitioners make several arguments under this item. For one, Petitioners
25 argue that the instruction was not individualized because Student was placed in a

26 ⁷⁰ A.A.C. R7-2-408(C).

27 ⁷¹ A.R.S. § 15-881(B).

28 ⁷² A.R.S. § 15-881(D).

29 ⁷³ 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513.

30 ⁷⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

⁷⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

1 Language Arts block. However, the evidence showed that the instruction Student
2 received was individualized. Student was placed in a Language Arts block because
3 that is how all second-grade Students were scheduled. The scheduling of the
4 instruction is a matter best left to the school district and the IEP team. There is no
5 indication that the Language Arts block schedule harmed Student's instruction.

6 13. Second, Petitioners argue that the October IEP goals should have focused
7 on decoding rather than fluency, since the evaluation had found decoding problems
8 with Student's reading ability. However, the first goal--"[Student] will read fluently with
9 less than 5 word substitutions and demonstrate phonemic awareness when decoding
10 unknown words"—did mandate work with decoding as part of fluency. Both of
11 Student's special education teachers, along with other Respondent School District
12 witnesses, testified that fluency and decoding are connected: fluency includes
13 decoding. Could the goal have been better written? Yes. Even school district
14 witnesses admitted as much. But, the IEP goals did relate to Student's disability in
15 basic reading skills. Thus, the October IEP did address Student's educational needs
16 that resulted from his disability. Petitioners have shown no violation in this regard.

17 *B) Was there documented data to support the discontinuation of the decoding*
18 *goal from the interim IEP and implementation of the fluency goal in the*
19 *October IEP?*

20 14. Petitioners' argument in this regard is unclear. As just noted, decoding was
21 part of the October IEP goals. Thus, the premise that the decoding goal was
22 discontinued in the October IEP is flawed. In addition, Petitioners have cited no legal
23 authority that requires documented data to "discontinue" a goal. IEPs are to be
24 reviewed and re-drafted at least yearly. This tribunal knows of no "right" to have the
25 exact same goals carry forward unless documentation supports discontinuing them.
26 Petitioners' argument here is unclear and unpersuasive.

1 C) *Did Student show adequate academic progress on the fluency goals in the*
2 *October IEP?*

3 15. As found above, Student made progress on his reading goals during the
4 year.⁷⁶ No evidence was submitted on what "adequate" progress would have been.
5 Furthermore, the IDEA does not mandate that a child make progress. It mandates that
6 the IEP be written so that it affords an opportunity for the child to make progress.
7 Whether the child makes progress is a combination of many factors, only one of which
8 is the IEP. In Student's case, the evidence shows that the October IEP, while it could
9 have been better written, did afford Student the opportunity to make progress and that
10 Student did, indeed, make progress.

11 D) *Was Student eligible for ESY services for the summer of 2007 and, if so, did*
12 *Respondent School District offer the services soon enough for Student to*
13 *enroll?*

14 16. The evidence shows that Student was eligible for ESY in the summer of
15 2007. Respondent School District did not make that determination at least 45 calendar
16 days before the end of school and, therefore, violated Arizona law. This was a
17 procedural violation and, therefore, this tribunal must determine whether the violation
18 denied Student FAPE. The answer is a matter of whether the violation impeded the
19 child's right to FAPE, significantly impeded parental participation in the process, or
20 resulted in a deprivation of educational benefit. This tribunal finds that the violation did
21 not lead to any of the three results for the reason that Parents had an opportunity to
22 enroll Student in the program but chose not to do so because they wanted a different
23 type of program and more scheduling flexibility than the ESY program offered by
24 Respondent School District. Thus, Parents voluntarily chose not to place Student in
25 ESY.

26 17. There is no question that Student's ESY eligibility was decided much too
27 late. However, Parents did have an opportunity to enroll Student in the program before
28 it began. When asked at the hearing why Parents rejected the offer of ESY, Mother
29 testified that the ESY program offered by Respondent School District was not what
30 Parents wanted for Student. They wanted one-on-one tutoring or as close to it as

1 possible. The ESY program did not offer that. They also did not want the ESY program
2 because of a church camp that Student was to attend that summer. She did not
3 mention that Parents rejected the offer because it was made too late or for some other
4 reason related to Respondent School District's failure to meet the 45-day rule. The
5 evidence shows that Parents rejected ESY because they wanted a different program
6 than what was offered by Respondent School District. Therefore, the procedural
7 violation did not deny Student FAPE.

8 *E) Was Student denied education in the Least Restrictive Environment (LRE)*
9 *because he was educated outside the general education population more*
10 *than was called for in the IEP?*

11 18. This is the most puzzling of Petitioners' arguments. Apparently, it is based
12 on the fact that Student was in the resource room for more time than called for in the
13 IEP and that Student was taught writing, an academic area in which he did not have a
14 disability listed in the IEP, in the resource room by a special education teacher rather
15 than in his regular classroom and by his regular teacher. Thus, the basis of the
16 argument is that Respondent School District did not implement the IEP as written and
17 had Student educated in a more restrictive environment than his disability required.
18 There are several reasons why this argument is not persuasive.

19 19. First, not every deviation from an IEP is a violation of the IDEA. In this
20 regard, a recent Ninth Circuit Court of Appeals decision is instructive. In *Van Duyn v.*
21 *Baker School Dist.*, 502 F.3d 811 (9th Cir. 2007),⁷⁷ the court addressed "how much
22 leeway a school district has in implementing an IEP as it translates the plan's provisions
23 into action at school and in the classroom."⁷⁸ The court held that when a school district
24 deviates from an IEP, it does not violate the IDEA unless there is a *material* failure to
25 implement the IEP. This occurs when there is more than a minor discrepancy between
26 what was provided and what was called for in the IEP. Notably, for the purposes of this
27 case, the court stated that "the materiality standard does not require that the child suffer
28 demonstrable educational harm in order to prevail. However, the child's educational
29 progress, or lack of it, may be probative of whether there has been more than a minor

30 ⁷⁶ Finding of Fact 14.

⁷⁷ Decided September 6, 2007.

1 shortfall in the services provided."⁷⁹ Therefore, there must be a material deviation from
2 an IEP before a violation will be found. And, when determining the materiality of the
3 deviation, educational progress or lack of progress may be considered.

4 20. Here, Student's time in the resource room was driven by the "block"
5 schedule. All second-grade Student's were on this schedule and Student was being
6 treated similarly. Additionally, Student's teachers testified that it is essential that
7 reading and writing be taught as related subjects and "intertwined." This makes sense.
8 Thus, it would not have made sense to break up Student's Language Arts block by
9 having him in the resource room for part of that block and in the regular classroom for
10 the other part. Given that Language Arts was taught as a block, Respondent School
11 District's decision to have Student stay in the resource room for the whole block makes
12 sense. Furthermore, there is no indication that Student's time in the resource room
13 harmed his education. In fact, it is likely to have helped it because of the continuity that
14 it fostered.

15 21. To the extent that Respondent School District deviated from the IEP by
16 teaching Student writing in the resource room, it was not a material failure to implement
17 the IEP.

18 22. Another reason why Petitioners' argument is not persuasive is that the legal
19 standard for LRE is to educate the child in the regular setting "to the maximum extent
20 appropriate."⁸⁰ For the reasons noted above, it was not appropriate to teach Student
21 writing in the regular setting when he needed to be taught reading in the resource room
22 and the schedule was a block schedule. The law provides some flexibility in this
23 regard.

24 *F) Did Respondent School District fail to acquire informed parental consent prior
25 to initial provision of special education and services?*

26 23. The record shows that Respondent School District did, indeed, fail to acquire
27 informed parental consent before initiating services to Student. However, this
28 procedural violation did not deny FAPE.

29 ⁷⁸ Slip Op. at 2.

30 ⁷⁹ *Id.* at 25.

⁸⁰ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2).

1 24. As found above, the consent for services form received from the charter
2 school was not signed by Mother. However, there was no way for Respondent School
3 District to know that and no reason for Respondent School District to inquire about it
4 with Mother, since Parents clearly wanted services and consent was never brought up
5 as an issue. But, Respondent School District's failure to obtain its own written consent
6 from Parents, regardless of the validity of the charter school form, is a violation of the
7 IDEA. The key in this regard is that the applicable regulation, 34 C.F.R. § 300.300,
8 puts the onus of getting written consent on the public agency responsible for FAPE—in
9 this case, Respondent School District:

10 (1) A public agency that is responsible for making FAPE
11 available to a child with a disability must obtain informed
12 consent from the parent of the child before the initial
13 provision of special education and related services to the
14 child. (2) The public agency must make reasonable efforts
15 to obtain informed consent from the parent for the initial
16 provision of special education and related services to the
17 child.⁸¹

18 Therefore, in a situation such as this, where the child has not been provided services by
19 the former school, and even though there is an apparently valid consent form from the
20 former school, the first school to provide services must obtain parental consent for the
21 initiation of services to the child. Failure to do so is a procedural violation of the IDEA.
22 Because Respondent School District was the first public agency to provide services, it
23 should have obtained its own written parental consent.

24 25. Here, however, there was no harm to Student because Parents clearly
25 wanted services from Respondent School District. In that light, this claim by Petitioners
26 is ridiculous and will be discussed no further.

27 *G) Did Respondent School District prevent Parents from being full participants in*
28 *IEP meetings by withholding information?*

29 26. There is no evidence that Respondent School District withheld information
30 from Parents. Although Mother testified that she did not receive certain documents,
Petitioners do not note any specific documents or cite to any authority that may have

⁸¹ 34 C.F.R. § 300.300(b).

1 been violated in that regard. Therefore, the claim cannot be judged. Furthermore,
2 Parents knew that were legally entitled to review Student's records at any time.⁸² They
3 received notice of this when they received the Procedural Safeguards Notice⁸³ that is
4 required by law and is intended to put parents on notice of their rights. Yet, they did not
5 ask to review Student's records until June 2007. Petitioners' claim is without merit.

6 *H) Did Respondent School District wrongly deny Parents' request for evaluation
7 regarding dyslexia?*

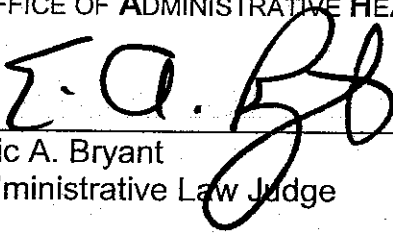
8 27. Again, Parents received notice of their procedural rights and, therefore,
9 could have discovered that a written request for evaluation is required to trigger a
10 response from Respondent School District. The evidence shows that Respondent
11 School District responded appropriately when Parents requested in writing an
12 evaluation for occupational therapy. There is no reason to believe it would not have
13 done so had Parents made a written request for further evaluation regarding dyslexia.⁸⁴
14 Absent that written request, Petitioners' claim fails.

15 **ORDER**

16 Based on the findings and conclusions above, IT IS HEREBY ORDERED that
17 the relief requested in the due process complaint is **denied**. Respondent School
18 District has not denied Student a free appropriate public education.

19 Done this 30th day of November 2007.

20 OFFICE OF ADMINISTRATIVE HEARINGS

21 
22 _____
23 Eric A. Bryant
24 Administrative Law Judge
25
26
27
28

29 ⁸² 34 C.F.R. § 300.501.

30 ⁸³ Finding of Fact 5.

⁸⁴ But see 34 C.F.R. § 300.302, which indicates that screening "to determine appropriate instructional strategies," which Mother's request may have been, is not considered to be evaluation.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and Order is the final decision at the administrative level. Furthermore, any party aggrieved by the findings and decisions made herein has the right to bring a civil action, with respect to the complaint presented, in any State court of competent jurisdiction or in a district court of the United States. Any action for judicial review must be filed within 90 days of the date of the Decision or, if the State has an explicit time limitation for bringing this type of action, in such time as the State law allows.

Copy sent by **electronic mail** and mailed by certified mail (l 7001 0360 0002 8217 1587
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By *Chris Fishbeck*